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**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

\* \* \*

JASON ALTHEIDE,

Plaintiff,

v.

BRIAN WILLIAMS, et al.,

Defendants.

Case No. 2:17-cv-02821-JCM-BNW

**ORDER**

13 This matter is before the court on plaintiff Jason Altheide's Motion for Leave to File Fifth  
14 Amended Complaint (ECF No. 33), Motion to Substitute or Add Defendants (ECF No. 36), and  
15 Motion to Exclude from Mediation (ECF No. 37). These motions are referred to the undersigned  
16 pursuant to 28 U.S.C. § 636(b)(1)(A) and LR IB 1-3 of the Local Rules of Practice.

17 **I. Background**

18 Mr. Altheide is a pro se prisoner in the custody of the Nevada Department of Corrections  
19 ("NDOC") at Ely State Prison. Altheide has also received permission to proceed *in forma*  
20 *pauperis* ("IFP") pursuant to 28 U.S.C. § 1915 and LSR 1-1 of the Local Rules of Practice. This  
21 case involves Mr. Altheide's allegations of civil rights violations pursuant to 42 U.S.C. § 1983.  
22 The court has reviewed the Fourth Amended Complaint (ECF No. 12) and, on December 7, 2018,  
23 found that it states three plausible claims against defendants Brian Williams, James Dzurenda,  
24 Alexis Lazano: (1) disciplinary segregation due process, (2) administrative segregation due  
25 process, and (3) cruel and unusual punishment. (Dec. 7, 2018 Screening Order (ECF No. 21).)

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1           **II.       Proposed fifth amended complaint**

2           Mr. Altheide moved for leave to file a fifth amended complaint on May 8, 2019,  
3 approximately one week after the deadline for doing so.<sup>1</sup> (ECF No. 33.) Defendants stipulate to  
4 the filing of the Amended Complaint. (*Id.* at 2.) Given the Plaintiff is incarcerated and the mail  
5 can be delayed, and considering the stipulation, the court excuses the late filing. Mr. Altheide is  
6 reminded that failure to comply with deadlines in the future may result in the court not  
7 considering his motions.

8           The motion for leave to file a fifth amended complaint is responsive to this court's  
9 February 28, 2019 order explaining to Mr. Altheide that if he

10                   wishes to substitute and add "John Doe Caseworker and John Doe Caseworker  
11                   Supervisor" for defendant Lorenza, he may file a motion seeking leave of the court  
12                   to file a fifth amended complaint pursuant to Rule 15, subject to the deadlines  
                    imposed in the scheduling order.

13 (ECF No. 26 at 3.) A comparison of the fourth amended complaint (ECF No. 12), which is  
14 currently the operative complaint in this case, and the proposed fifth amended complaint (ECF  
15 No. 33-1) reveals a few differences. The proposed fifth amended complaint adds "John Doe I"  
16 and "John Doe II," and it also adds "Count I" which was missing from the fourth amended  
17 complaint.<sup>2</sup> In addition, the claim for relief in the fifth amended complaint is lowered from one  
18 million dollars to one hundred thousand dollars. (*Id.*)

19           When this court screened the fourth amended complaint, it did not screen Count I as it was  
20 not in the pleading. The sum and substance of Count I is that defendant Williams (High Desert  
21 State Prison Warden) is responsible, under a respondeat superior theory of liability, for John Doe  
22 I's and John Doe II's failure to hold a hearing prior to placing Mr. Altheide in administrative  
23 segregation. (ECF No. 33-1 at 4.) This court already found Mr. Altheide stated a plausible due  
24 process violation claim based on his placement in administrative segregation against defendants  
25 Lazano, Dzurenda, and Williams. (ECF No. 21 at 6-7.) As a result, the substance of Count I is

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27           <sup>1</sup> The deadline for filing amended pleadings was April 29, 2019. (ECF No. 27.)

28           <sup>2</sup> *See* Screening Order noting the absence of Count 1 from the fourth amended complaint. (ECF  
No. 21, p. 4., n.1.)

1 duplicative. However, the court will include John Doe I and John Doe II as defendants to the  
2 claim alleging a due process violation based on his placement in administrative segregation.  
3 Given that Count I in the proposed fifth amended complaint does not include defendant Lorenza,  
4 coupled with Mr. Altheide's request to substitute John Doe I and John Doe II for defendant  
5 Lorenza (ECF No. 24), this court orders that defendant Lorenza be dismissed as a defendant as to  
6 the claim for violation of due process based on administrative segregation.

7 Accordingly, the court will grant in part and deny in part Mr. Altheide's Motion for Leave  
8 to File Fifth Amended Complaint. The motion is granted to the extent the court will substitute  
9 John Doe I and John Doe II to the administrative segregation due process claim. The motion is  
10 denied in all other respects, and the fourth amended complaint shall remain the operative  
11 complaint, except that John Doe I and John Doe II are added as defendants to the administrative  
12 segregation due process claim.

### 13 **III. Motion to Substitute or Add Defendants**

14 After he requested the court's permission to file a fifth amended complaint, Mr. Altheide  
15 filed a motion to Substitute a Party. (ECF No. 36). Specifically, he requests to substitute Erik  
16 Elmore for John Doe I. Apparently, Mr. Altheide learned John Doe I's identity while the Motion  
17 for Leave to File a Fifth Amended Complaint was pending. Defendants did not oppose the  
18 motion, which constitutes a consent to the granting of the motion under Local Rule 7-2(d). The  
19 court will allow Mr. Altheide to substitute Erik Elmore for John Doe I. Accordingly, the court  
20 will grant Mr. Altheide's Motion to Substitute or Add Defendants.

### 21 **IV. Motion to Exclude from Mediation**

22 Lastly, Mr. Altheide filed a Motion to Exclude his case from Mediation. (ECF No. 37.) He  
23 argues Defendants have never made a legitimate offer and, thus, having a settlement conference  
24 would be a waste of time. (Id.) Defendants did not respond, which constitutes a consent to the  
25 granting of the motion under Local rule 7-2(d).

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1 The docket reflects Mr. Altheide already participated in the Inmate Early Mediation  
2 Program. (ECF No. 18.) Given that the motion is unopposed, the court will not schedule a second  
3 Inmate Early Mediation. Nevertheless, Mr. Altheide may be ordered to participate in a settlement  
4 conference in the future under Local Rule 16-5.

5 **V. Conclusion**

6 It is ordered that Mr. Altheide's Motion for Leave to File Fifth Amended Complaint (ECF  
7 No. 33) is GRANTED in part and DENIED in part as stated in this order.

8 It is further ordered that Mr. Altheide's Motion to Substitute or Add Defendants (ECF No.  
9 36) is GRANTED.

10 It is further ordered that the clerk of court must substitute Erik Elmore for defendant John  
11 Doe I on the court's docket.

12 It is further ordered that Mr. Altheide's Motion to Exclude Case from Mediation (ECF  
13 No. 37) is granted.

14 It is further ordered the fourth amended complaint (ECF No. 12) shall remain the  
15 operative complaint.

16 It is further ordered that the disciplinary segregation due process claim will proceed  
17 against defendants Lazano, Dzurenda, and Williams.

18 It is further ordered that the administrative segregation due process claim will proceed  
19 against defendants Dzurenda, Williams, Erik Elmore, and John Doe II.

20 It is further ordered that the cruel and unusual punishment claim will proceed against  
21 defendants Lazano, Dzurenda, and Williams.

22 It is further ordered that the Clerk of Court must send to Plaintiff one blank summons  
23 forms and one blank USM-285 form, along with a copy of this order.

24 It is further ordered that Plaintiff must complete the forms and file them with the court by  
25 January 31, 2020.

26 It is further ordered that upon receipt of the proposed summons and completed USM-285  
27 forms from Plaintiff, the Clerk of Court must issue the summons and deliver the summons, the  
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1 USM-285 form, a copy of Plaintiff's forth amended complaint (ECF No. 12), and a copy of this  
2 order to the U.S. Marshal for service.

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4 DATED: January 3, 2020

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BRENDA WEKSLER  
UNITED STATES MAGISTRATE JUDGE